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Case Comments

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AGENCY—LIABILITY OF AGENT.—Appellee, real estate agent, was employed by R. to sell at auction his farm. At the sale appellant, G, became purchaser for $8,000. As per terms of the sale G. paid 10% of the purchase price, to-wit, $800, making the check payable to the agent, who endorsed and delivered it to R. R. paid the agent his commission in cash, but being unable to convey good title to G. the latter sued both R. and the agent to recover the $800. R. was adjudged bankrupt before suit. G. relies on the principle of an auctioneer being stakeholder, for recovery against the agent. Held, judgment against R. affirmed but dismissed as to the agent; the 10% paid was not deposited as a trust fund in hands of the agent, but was part-payment or trust fund in hands of the owner, and the agent is not liable for the return thereof to payer. *Gossage* v. *Waddle*, et al. 18 S. W. (2nd) 975.

The general rule is that "a payment properly made to an agent for a known principal in pursuance of a valid authority, and without fraud, duress or mistake, may not be recovered from the agent. The remedy, in the event the recovery of the money becomes available, is against the principal." *Robenson* v. *Yann*, 5 S. W. (2nd) 271, 230 Ky. 148.

Aside from the general rule as stated in the above case and followed in this case, there seems to be few cases in this state directly upon the question involved, but we find in *Noble* v. *Clark*, 283 S. W. 975, 214 Ky. 569, "where a purchaser of a lot at auction made first payment to vendor, who indorsed check to auctioneer as his commission, the auctioneer is not liable to purchaser as a stakeholder for money paid, though vendor fails to convey good title." Altho distinguishable from case under discussion, yet by analogy this conforms to the general rule, above stated. See also, *Pool* v. *Adkisson*, et al. 1 Dana (Ky.) 110.

However, there is abundant authority establishing this general rule in other states as found in *Allen* v. *Globe Grain & Mill Co.*, 104 Pac. 305, 156 Cal. 286, "a cash payment to agent by the purchaser, and money paid to vendor by the agent, the vendor alone is liable for repayment upon his failure to convey."

Also, in *Lang* v. *Friedman*, 148 S. W. 992, 166 Mo. App. 354; *Steinberg* v. *Wisisch*, 142 Atl. 824, 6 N. J. Misc. R. 819; *Cohen* v. *Barry*, 108 N. Y. Supp. 573; *Tripple v. Littlefield*, 89 Pac. 493, 46 Wash. 156.

We find one variation of the general rule in the case of *Cassimus* v. *Vaughn Realty Co.*, 117 So. 180, 217 Ala. 561, where it is held that "where money paid to an agent which in equity belongs to the payer, is recoverable from the agent prior to his payment thereof to the principal." This case can readily be distinguished from the one at bar in that no suit was brought by the payer there before the agent had paid the money over to the principal or owner of the land.

Only one class of cases upholds responsibility of the agent for return of money paid as part of purchase price where the owner has

failed to convey after receiving such money. This class of cases includes those situations where the principal has no right to receive the money; where it was paid by mistake; where the agent has exceeded his authority or was guilty of misfeasance; where payment was induced by fraud or there was an explicit agreement to return it to the payer.

A. J. A.

APPEAL AND ERROR—RELATION OF MOTION FOR NEW TRIAL TO APPEAL. —Plaintiff sued for money paid on false representations of defendant. At the conclusion of the evidence offered by the plaintiff the trial court sustained a motion for a directed verdict in favor of the defendant. This was on November 18, 1927. On December 15, 1927, the plaintiff entered a motion for a new trial setting up the sole ground of newly discovered evidence. This motion was overruled and he appealed. Held, that the only ground for new trial embodied in the motion being newly discovered evidence, no other ground can be considered on appeal. *Brown* v. *Union Packing Co.*, 229 Ky. 198, 16 S. W. (N. S.) 1024.

That this has long been the law in Kentucky will permit of but little doubt. The first Kentucky case on the subject seems to be *Hopkins* v. *Commonwealth*, 3 Bush 480. There it is said: "The code requires all grounds relied upon for new trial to be specified in writing, consequently no error not so stated could be noted by the circuit court and is necessarily beyond the sphere of this court's jurisdiction, which is only to decide whether on grounds properly before it the circuit court erred in its judgment."

When there is no motion for a new trial nothing but the pleadings, verdict and the judgment will be considered on appeal. *Western Assurance Co.* v. *Rector*, 85 Ky. 294, 1 S. W. 391; *Ruhrwein* v. *Gebhart*, 90 Ky. 147, 13 S. W. 447. The reason for this rule is explained in *Harper* v. *Harper*, 73 Ky. 447. There the court holds that the judgment appealed from is the overruling of the motion for a new trial and not the judgment on the verdict. Language is used in many cases apparently inconsistent with this view, but decisions are all in accord. It has been said that an appeal will lie at the term at which the motion for new trial is overruled although "the judgment appealed from" was at prior term, *Stearn Coal and Lumber Co.* v. *Commonwealth*, 163 Ky. 837, 174 S. W. 771; and that a motion for a new trial "suspends" the judgment, *Louisville Rock and Lime Co.* v. *Kerr*, 78 Ky. 12.

Consistent with the distinction in *Harper* v. *Harper*, *supra*, is the ruling that the appellant must not only make the trial court's rulings grounds for motion for new trial but must also obtain a ruling by the court on the motion and entry of an order denying the same. *Lyon* v. *Logan County Bank*, 25 Ky. L. Rep. 1668, 78 S. W. 454. A further consistent decision is to the effect that there must also be an exception to this ruling. *Gordon* v. *Gordon*, 1 J. J. Marsh. 55.

The rule of the principal case does not apply to equity actions. *Nickels v. Collins*, 153 Ky. 219, 154 S. W. 1090; *Salyer* v. *Arnett*, 23 Ky. L. Rep. 321.

There is a decided conflict of authorities upon this point in other jurisdictions but the greater number of states are in accord. States holding that objections to errors occurring at trial must be embodied in motion for new trial in order to be considered on appeal are: Alabama, Arizona, Arkansas, Colorado, Georgia, Idaho, Illinois, Indiana, Kansas, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Dakota, Oklahoma, South Carolina, Tennessee, Utah, Virginia, West Virginia, Wyoming and Montana. States holding contra are California, Florida, Iowa, Louisiana, Nevada, North Carolina, Ohio, South Dakota, Washington and Oregon. Elliott on Appellate Procedure, section 347, favors the majority rule for two reasons, it gives the trial court opportunity to review its own rulings and secures uniformity.

Much can be said in support of the logic of the position taken by the Texas courts on this subject. There it is held necessary to make grounds for motion for new trial only such objections as the trial court has had no previous opportunity to rule upon. As to other objections it is said, "The trial judge having once acted, it is not to be presumed that he will change his ruling and hence in order to appeal from such action it is not necessary that it be made ground for new trial." *Clark v. Pearce*, 80 Tex. 146, 15 S. W. 787. Agreeing with this argument is 4 Texas Law Review 486. R. M. O.

CORPORATIONS—ADOPTION BY CORPORATION OF PROMOTER'S CONTRACTS —Defendant Company's agent G induced S to buy machinery for the manufacturing of duntile for the benefit of a corporation which S and others contemplated organizing. G agreed to have the machinery installed by an expert satisfactorily. After the installation the plaintiff corporation was formed. The machinery did not work satisfactorily and the plaintiff sues on the agreement between G and S. Held: The plaintiff could recover on the agreement as it had been adopted and had been made for its benefit. *Builders Duntile Co. v. W. G. Dunn Mfg.* Co., 17 (2d) S. W. 715.

The doctrine of the instant case rests upon the rule stated in 1 Thompson on Corporations 113 to the effect that "the power to adopt is conceded, and the effect of the adoption is said to be to make the contract that of the corporation. Such a power is limited, however, to contracts which the corporation itself could make." This is a reasonable and practical rule. The adoption theory was first applied in Kentucky in 1828 in the case of *Frankfort and Shelbyville Turnpike Co. v. Churhill*, 6 T. B. Mon. 427, 17 Am. Dec. 159. It was mentioned there that to allow the corporation to escape liability on a contract for its benefit "would be transcendent and would verify the complaint of long standing, and reiterated by wisdom and experience in many preceding generations, that it is difficult to obtain common justice in a dispute with a corporation." This view works in favor of the corporation as well as against it.

The English courts deny the corporation the power to ratify or adopt a contract made by a promoter before the corporate existence for its benefit. A corporation cannot ratify because an agency relationship is an absolutely essential element of ratification. Such is not possible between a promoter and a non-existent corporation. Adoption is impossible also in England because of the privity of contract theory. Privity exists between the original parties and the later corporation cannot become privy to a contract for its benefit merely by adoption. Such are the views set forth in *North Sydney Invest. & Tramway Co.* v. *Higgins*, (1899) A. C. 263; *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, (1902) 1 Ch. 146; *Re English and Colonial Produce Co.*, (1906) 2 Ch. 435. Technically and theoretically the English court is correct. Practically the English doctrine is incorrect and illogical. Only one State, Massachusetts, follows the above view.

The great majority of American Jurisdictions allow the corporation to ratify or adopt contracts made by promoters for its benefit, using the terms interchangeably. This view is also open to criticism. There is a clear cut difference in the meanings of the two words. "Adoption is assent to a contract which was made in contemplation of the later corporation accepting it; whereas, ratification is the adoption of an act of one who purports to act as an agent." Ballantine on Corporations, pages 156-166. The writer submits that in cases such as the one under discussion that adoption is the only correct terminology. However, in some cases the lone term ratification is used. *Bloom* v. *Home Ins. Agency*, 91 Ark. 367, 121 S. W. 293; *Davis Bros.* v. *Montgomery Furnace and Chemical Co.*, 101 Ala. 127, 8 S. W. 496.

Adoption can be either express or implied. *Bruner* v. *Brown*, 139 Ind. 600, 38 N. E. 318; In re Ballou 215 F. 810; *Burden* v. *Burden*, 40 N. Y. S. 499; *Whitney* v. *Wyman*, 101 U. S. 392. Mere acceptance of benefits by the corporation will not make it liable. The intention of the parties at the time the contract was made must be ascertained. *Tryber* v. *Girary Creamery and Cold Storage Co.*, 67 Kan. 489, 73 P. 83.

There are three cases which should be noted before terminating this comment. (1) *Queen City Furniture and Carpet Co.* v. *Crawford*, 127 Mo. 356, 30 S. W. 163. The court in this case repudiated both ratification and adoption and held that what the corporation really did was to make the original contract itself. To speak of adoption seems more reasonable. (2) *Kirkup* v. *Anaconda Amusement Co.*, 59 Mont. 469, 197 P. 1005. The original contract was considered as a continuing offer; the acceptance of which made the corporation liable. (3) *Kridelbaugh* v. *Aldrehn Theatres* Co., 195 Ia. 147, 191 N. W. 803. The court treated the adoption by the corporation as a novation and consequently achieved the result for which it sought.

In conclusion the writer submits that the Kentucky court is to be commended for the proper solution of the question at bar. W. C. W.

CORPORATIONS—RIGHT TO PAY AGENT SUM IN EXCESS OF CONTRACT STIPULATION.—According to the contract existing between the parties the agent was to receive a certain per cent bonus on all insurance written by him provided such policies aggregated a certain amount. The agent failed to sell sufficient insurance to entitle him to the bonus. However, the insurance company as an inducement to keep the agent in their employ did allow him the per cent bonus on all insurance actually written by him. Held, that the insurance company could not recover back the amount of the bonus. *American National Assurance Co. of St. Louis* v. *Ricketts*, 19 S. W. (2nd) 1071.

In handing down the decision in the instant case the Kentucky Court said: "The officers of a corporation have a discretion in settling with their agents on such terms as they think the interest of the corporation requires." There is no implied authority in a corporation to give away any portion of the corporate property unless such gift will result in a direct and substantial benefit to the company. 1 Morawetz, Private Corp., 2nd Ed., 399. A business corporation is organized and carried on primarily for the profit of the stockholders. The discretion of the directors may be exercised in the choice of means in obtaining the most profit. Their power does not extend to the reduction of profits or the nondistribution of profits among stockholders in order to devote such profits to other purposes. *Dodge* v. *Ford Motor Co.*, 204 Mich. 459, 170 N. W. 668, 3 A. L. R. 413 (1919).

In *Steinway* v. *Steinway*, 17 Misc. Rep. 43, 40 N. Y. Supp. 718, the court laid down the following rule: "If the act is one which is lawful in itself, and not otherwise prohibited, is done for the purpose of serving corporate ends, in a substantial and not in a remote and fanciful sense, it may fairly be considered within charter powers." So in regard to gifts the real test seems to be whether or not the corporation will receive a direct and proximate benefit therefrom. *Evans* v. *Brunner, Mond & Co.*, 90 L. J. Ch. D. 294. Gifts which would tend indirectly to increase profits are held ultra vires. *Tompkinson* v. *Southeastern R. Co.*, 1887 L. R. 37 Ch. D. 675; *Davis* v. *Old Colony R. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Military Ass'n* v. *Savannah Ry. Co.*, 105 Ga. 420, 31 S. E. 200.

Gifts to agents or employees, either directly or indirectly, are generally presumed to result in a direct and substantial benefit to the corporation. *Armstrong Cork Co.* v. *H. A. Meldrum Co.* (*D. C.*), 285 Fed. 59. "It is settled," states Machen on Corporations, Vol. 1, sec. 87, "that a corporation may bestow reasonable gratuities on its employees in addition to the compensation to which they may be legally entitled." This is the rule generally adhered to in most jurisdictions. *Maine* v. *Chicago Ry.*, 109 Iowa, 260, 70 N. W. 630; *People ex rel., Metropolitan Life Ins. Co.* v. *Hotchkiss*, 136 App. Div. 150, 120 N. Y. Supp. 649; *Hampson* v. *Prices Patent Candle Co.*, 45 L. J. Ch. 437; *Henderson* v. *Bank of Australasia*, 40 Ch. D. 170; *Vandall* v. *South San Francisco Dock Co.*, 40 Cal. 83; *Taunton* v. *Royal Insurance Co.*, 71 English Rep. 413, 2 H. & M. 135.

It is submitted that the rule of the instant case, while sound in its present application, should not be extended since it might result in the stockholders of the corporation being deprived of profits to which they should be legally entitled. E. E. A.

CORPORATIONS—TRANSFER OF STOCK.—Defendant was owner of large block of stock in an oil and gas corporation. The stock was of little actual value but with the continuance of operation of the company might become very valuable. For very good reasons defendant feared an attack might be made on his life. Realizing that upon his death the stock would have to be sold he had it assigned and transferred on the books of the company to his son, Jno. G. White, Jr. The latter did not know of the transaction until some time afterwards. Defendant retained possession of the certificates. The court found that defendant, in making the transfer, did not intend to relinquish control over or divest himself of the ownership of the stock. A short time later John G. White, Jr., was killed. He left a will leaving everything to his brother, the plaintiff, who claims the stock by virtue of the will. Held —Since the certificates had not been delivered title had not passed. *White* v. *White*, 229 Ky. 666, 17 S. W. (2nd) 733.

Since there is no evidence of consideration for the transfer to the testator, the question resolves itself into this: does a transfer of shares of stock on the books of the company by the donor without a delivery of the certificates to the donee and where it is shown there was no intent to relinquish control over them, give legal title?

In the case of *Foxworthy v. Adams et al.*, 136 Ky. 403, 124 S. W. 381, Ann. Cas. 1912A 327, it was stated "the rule is that to constitute a valid 'gift inter vivos' there must be a gratuitous and absolute transfer of the property from the donor to the donee, taking effect immediately, and fully executed by a delivery of the property by the donor and acceptance theerof by the donee." And again in *Stark* v. *Kelly*, 132 Ky. 376, 113 S. W. 498, the rule is thus stated, "To constitute a gift inter vivos, the property must be delivered absolutely, and the gift must go into immediate effect, and where future control remains in the donor until his death, there is no valid gift inter vivos." Such language is expressive of the general rule throughout the United States. *Fox* v. *Shanley*, 94 Conn. 350, 109 Atl. 249; *Hayes* v. *McKinney*, 73 Ind. App. 105, 126 N. E. 497; *Schwab* v. *Schwab*, 163 N. Y. S. 246, 177 App. Div. 246; In re Cooper's Estate, 263 Pa. 37, 106 Atl. 98.

In the case of *Kelley-Koett Mfg. Co. et al.* v. *Goldenburg*, 207 Ky. 695, 270 S. W. 15, cited in the case at bar, the plaintiff claimed she was entitled to a share of stock in the defendant corporation by virtue of a vote of the board of directors, the minutes of the meeting at which such vote was made, and the fact that such certificate had been filled out in her favor but remained in the stock book. Her petition was denied, the court reiterating the essentiality of delivery.

The decision of the Missouri case of *Jones* v. *Jones*, 201 S. W. 557, (1918) is directly in point with the case at bar. There it was held that it is not a sufficient delivery of stock for a party merely to have the stock transferred to the name of the donee, but in addition to this an actual or constructive delivery of the stock must be shown. See also *Gray* v. *Doubkin*, 188 Mo. App. 667, 176 S. W. 514.

By the weight of authority, a valid gift of stock, either inter vivos or causa mortis, may be made by delivery of the certificate of stock accompanied by words of absolute or present gift, without any written assignment or indorsement or express power of attorney thereon or accompanying it. Ballantine, Private Corporations, Sect. 146, page 455; *Commonwealth* v. *Compton*, 137 Pa. St. 138, 20 Atl. 417; *Grymes* v. *Hone*, 49 N. Y. 17, 10 Am. St. Rep. 313. See also Mechem, Gifts of Corporation Shares, 20 Ill. L. Rev. 9, 30 Yale L. J. 767.

Under the Uniform Stock Transfer Act, which has been adopted in seventeen states, delivery of the certificate is essential to transfer legal title. This Act, which has not as yet been adopted by Kentucky, is as follows:

Sect. 1. "Title to a certificate and to the shares represented thereby can be transferred only (a) by delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby or (b) by delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person." See Ballantine, Private Corporations, section 146, p. 456. C. E. B.

EVIDENCE—NECESSITY OF AVOWAL.—On appeal it was urged that the trial court had erred in excluding competent evidence offered by appellant. In the trial the witness for the commonwealth testified to the reputation of the prosecuting witness. On cross-examination he was asked several questions to each of which the objection of the commonwealth was sustained. Held: Such evidence was competent and its exclusion was erroneous, but no avowal being made as to what the witness would have said if permitted to answer that ground for error could not be sustained. *Hall* v. *Commonwealth*, 17 S. W. (2nd) 751.

The courts of this state follow the doctrine of the principal case. *Music* v *Commonwealth*, 186 Ky. 45, 216 S. W. 116; *Mullins* v. *Commonwealth*, 172 Ky. 92, 188 S. W. 1079; *Martin* v. *Commonwealth*, 178 Ky. 540, 199 S. W. 603; *Gregory* v. *Commonwealth*, 178 Ky. 188, 218 S. W. 999.

That the trial court should be apprised of the evidence sought to be elicted from the witness if its exclusion is to be urged as error is a well settled general rule. *Campbell* v. *State*, 24 Ga. App. 138, 100 N. E.

30; *State* v. *Wallace*, 110 Kan. 565, 204 P. 533; *Frances* v. *State*, 22 Okla. Cr. 287, 211 P. 433; *Sarkisia* v. *U. S.*, 3 Fed. (2nd) 161; *People* v. *Reyes*, 194 Cal. 640, 229 P. 947. The trial court will not be put in error for refusing to allow the question answered when counsel did not state to the court what answer he expected. *Castona* v. *State*, 17 Ala. App. 421, 84 So. 871.

There are, however, exceptions to this general rule. One such exception is where the question itself or the circumstances surrounding or leading up to it show its materiality or relevancy. Evidence should be admitted if competent and relevant upon any issue or phase of the case. *Moffatt* v. *U. S.*, 232 Fed. 561. The party offering the evidence need not explain the point or matter to which it is addressed unless required to do so by the court. *Moor* v. *U. S.*, 150 U. S. 57. The trial court cannot be put in error for refusing to allow the question to be answered when it it not suggested to the court what was to be proved, unless, the question in itself gave such information. *Woods* v. *State*, 18 Ala. App. 123, 90 So. 52; *Terry* v. *State*, 203 Ala. 99, 82 So. 113, 1 Michie's Dig. 353, 205; *People* v. *Langzene*, 307 Ill. 56, 138 N. E. 222; *State* v. *Finley*, 211 P. 303. Where the question propounded to the witness calls for evidence prima facie relevant and legal the refusal to allow it is error although no answer or proposed answer of the witness was stated. *Wheat* v. *State*, 18 Ala. App. 554, 93 So. 209; *Phoenix Ins. Co.* v. *Mogg*, 78 Ala. 248, 56 Am. Rep. 31; In *State* v. *Martino*, 27 N. M. 1, 192 P. 507 the court says, "It is to be noted that the question requires no explanation to the court; it being self-explanatory. No answer the witness could make to the question would be irrelevant or immaterial and the rule requiring explanation to the court does not apply."

While this exception is perhaps not universally recognized, the Kentucky courts evidently not considering it, *Hall* v. *Commonwealth*, *supra*, yet it seems a very reasonable exception or limitation on the general rule. It should however be applied with extreme caution. Unless the question itself or circumstances preceding or surrounding it show clearly that the answer would have been relevant and material to the issue the exception should not be allowed.

The reasons given for the exception to the general rule are that it might be very inconvenient in practice if a party were required to accompany each question with a statement of facts expected to be established regardless of whether the question was proper in form and manifestly relevant to the issue or not. It would be a means of instructing the witness of the answer desired. For these reasons and to insure against delay and carelessness in the trial court and to make it more closely observe procedure and weigh matters carefully the exception to the general rule should be applied.

That the general rule does not apply to cross-examination is recognized by some courts. *Cunningham* v. *Austin & N. W. Ry. Co.*, 88 Tex. 534, 31 S. W. 629; *Harness* v. *State*, 57 Ind. 1; *Hutts* v. *Hutts*, 62 Ind. 225. The reasons given are that the counsel is not supposed to be familiar with the adversary's knowledge of the case, and that to exact

such a statement would be to require counsel either to speculate upon the answer of the adverse witness or deal unfairly with the court. *O'Donnell* v. *Segar*, 25 Mich. 367, 1 Thomp. Trials, Sec. 680. To be compelled to state what one expects to show by cross-examination of the adversary's witness would often defeat the purpose by putting the witness on his guard, besides the examiner does not always know what he may reasonably expect to bring out in the cross-examination of a witness. *Knapp* v. *Wing*, 72 Ver. 334, 47 Atl. 1075.

The Kentucky court did not recognize any distinction between cross-examination and direct examination in the principal case. However, for the reasons given and others a distinction should be made.

K. F.

EVIDENCE—STATEMENT OF VICTIM, IMMEDIATELY AFTER AUTOMOBILE COLLISION, AS TO BACK HURTING, MIGHT BE CONSIDERED PART OF THE RES GESTAE.—Plaintiff was injured in a collision between auto in which she was riding and defendant's bus. Immediately after the accident, she said, "My back hurts so bad I can hardly stand up." The admission of this statement as evidence was held not grounds for reversal, because (among other reasons), it might properly be considered as a part of the res gestae. *Consolidated Coach Corporation* v. *Saunders*, 17 S. W. (2nd) 233, 229 Ky. 284.

No hard and fast rule can be laid down as to the admissibility of evidence as a part of the res gestae. The question in each case must be decided on the particular facts and circumstances presented. *Louisville Ry. Co.* v. *Johnson's Admr.*, 115 S. W. 207, 131 Ky. 277. That the ruling of the court in *Consolidated C. C.* v. *Saunders* was correct is amply supported by judicial decision. In *Louisville & N. R. Co.* v. *Miller*, 157 S. W. 8, 154 Ky. 236, exclamations of pain and statements made two or three minutes after an accident by the person injured while lying on the ground at the place of the accident were held admissible as res gestae. Such evidence meets the tests laid down in *Norton's Adm'r* v. *Winstead*, 291 S. W. 723, 218 Ky. 488, holding that statements, to be admissible as part of the res gestae, must be spontaneous utterances of thoughts springing out of the happening itself, being made at a time which would exclude presumption that they were the result of premeditation or design.

In admitting the statement of the accident victim that "My back hurts so bad I can hardly stand up," the Kentucky court was in accord with most, if not all, of the other state and federal courts. *In Kansas City Southern Ry. Co.* v. *Clinton*, 224 Fed. 896, *Nicoll* v. *Sweet*, 144 N. W. 615, 163 Ia. 683, *Sutton* v. *Southern Ry. Co.*, 64 S. E. 401, 82 S. C. 345, *Alabama Power Co.* v. *Edwards*, 121 So. 543, *Runnells v. Pecos & N. T. Ry. Co.*, 107 S. W. 647, 49 Tex. Civ. App. 150, and *Pryor* v. *Payne*, 263 S. W. 972, 304 Mo. 560, the question of the admissibility of statements of an injured party, made immediately after the accident, was presented for adjudication. The main facts in each case were very similar to

those in Saunders case. And in each case the court held the evidence admissible as a part of the res gestae. These cases are in accord with the general rule stated in *Bacan* v. *Charlton*, 7 Cush. (Mass.) 586, (approved in *L. & N. R. Co.* v. *Smith*, 84 S. W. 755, 27 K. L. R. 257, and in *L. & N. R. Co.* v. *Scalf*, 159 S. W. 804, 155 Ky. 273, "Where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings made at the time, are considered competent as original evidence in his favor." R. L.

GIFTS—GIFT CAUSA MORTIS.—Defendant was sued for postal savings certificates by donor's administrator. Donor, on being taken to the hospital, gave his nephew the certificate wrapped in a packet. After being in the hospital about ten days the donor expressed his belief that he could only live a short time and told his nephew to give the certificates to the defendant, which the nephew did. Held, since from the evidence it appeared that: (1) the testator was competent, (2) the gift was made in view of the donor's death impending from an existing disorder, (3) the donor died within a few days from the cause then expected, (4) there was a clear intention to make a present gift and (5) there was execution of this intention by delivery to a third person for the donee, all the requisites of a gift causa mortis were present and the gift must stand. *Williams* v. *Letton*, 228 Ky. 371, 15 S. W. (N. S.) 296.

The doctrine of gifts causa mortis is a very ancient one, coming, as Blackstone suggests, from the Greeks to the Roman law under Justinian. The doctrine was first recognized in England in 1717 in the case of *Drury* v. *Smith*, 1 P. Wms. 404, 24 Eng. Rep. 446. By reason of its antiquity and universal application the law of gifts causa mortis is fairly well settled and the requisites to the validity of such gift rather certain.

The first requisite, as laid down in the instant case, that is, the competency of the donor, consists of two elements; the donor must be sui juris and of sufficient mental capacity. *Royston* v. *McCulley*, 50 S. W. 725, 52 L. R. A. 899. The same rules govern the requirements for mental capacity as in the case of making a will. *Sass* v. *McCormack*, 62 Minn. 234, 64 N. W. 385; Matter of Hall, 16 Misc. (N. Y.) 174, 38 N. Y. Supp. 1135; Gardner on Wills, p. 10.

It is universally held that the gift must be made in view of the donor's death in the near future from an existing disorder. See 1 Story Eq. Jur. 607a. Blackstone speaks of the donor as "apprehending his dissolution near." 2 Blackstone Commentaries 514. This view is found expressed in Kentucky in *Knott* v. *Hogan*, 4 Metcalf 99, and *Walden* v. *Dixon*, 5 T. B. Monroe 170. According to Bigelow, one of the leading cases in other jurisdictions is *Ridden* v. *Thrall*, 125 N. Y. 572, 26 N. E. 627. It is also unmistakably requisite in England. *Edwards* v. *Jones*, 5 L. J. Ch. 194, 40 Eng. Rep. 361.

The validity of the gift "is dependent upon the condition of death occurring substantially as expected by the donor." 3 Redfield on Wills, 322. This is properly interpreted by *Earl, J. in Ridden* v. *Thrall, supra;* "The doctrine meant to be laid down was that the donor must not recover from the disease from which he apprehended death." This is the accepted meaning of the courts' third requirement. *Peck* v. *Scofield,* 186 Mass. 108, 71 N. E. 109.

That there must be a clear intention to make a present gift has clearly been the law in Kentucky, *Duncan* v. *Duncan,* 5 Litt. 12; *Roche* v. *George,* 13 Ky. L. Rep. 493; as well as in other jurisdictions, In re Tart, 180 N. C. 105, 104 S. E. 65; *Gano* v. *Fiske,* 43 Ohio St. 462; 30 N. E. 532. "Courts will require in every case clear and convincing proof, yet when it is once ascertained that it is the intention of the donor to make such a gift . . . the gift will be sustained." *Scott* v. *Union & Planters Bank,* 123 Tenn. 258, 130 S. W. 757. See also discussion in *Parker* v. *Copeland,* 76 N. J. Eq. 685, 64 Atl. 129.

Under the civil law delivery was not absolutely essential. *Kenistons* v. *Sceva,* 54 N. H. 24. Under the common law however delivery is necessary to validity. *Webber* v. *Salisbury,* 149 Ky. 327, 148 S. W. 34; *Butler* v. *Scofield,* 4 J. J. Marsh. 139, 20 Am. Dec. 211. That this delivery might be made to a third person for the donee does not appear to be questioned. In England it was never denied. *Bouts* v. *Ellis,* 17 Beav. 121, 51 Eng. Rep. 978. In the first case of gift causa mortis in England, *Drury* v. *Smith, supra,* delivery was to a third person. This view has been consistently followed in the United States. *Devol* v. *Dye,* 123 Ind. 321, 24 N. E. 246.

Postal savings certificates follow the same rules as govern choses in action in general in that they are properly subject to such gift. *Stephenson* v. *King,* 81 Ky. 425, 80 Am. Rep. 173; *Sessions* v. *Mosely,* 4 Cush (Mass.) 87; *Veal* v. *Veal,* 27 Beav. 303, 54 Eng. Rep. 118.

R. M. O.

JUDGES—RIGHT TO QUESTION FACTS STATED IN AFFIDAVIT TO HAVE JUDGE VACATE BENCH.—After a decree of divorce, alimony and the custody of their child, the appellee gave notice he would move the court to reinstate the case and modify the judgment. A motion was filed in Court by the appellant which was supported by affidavit, asking that and giving reasons why the regular judge should vacate the bench. In overruling the latter motion the judge gave as his reason that the statements in the affidavit were untrue. Held—When facts are stated in an affidavit for purpose of having the regular judge vacate the bench, they cannot be put in issue or called in question by the judge. *Jasper* v. *Jasper,* 229 Ky. 137, 16 S. W. (2nd) 787.

Section 968, Kentucky Statutes, provides, " . . . or, if either party shall file with the clerk of the court his affidavit that the judge will not afford him a fair and impartial trial . . . the parties, by agreement, may elect one of the attorneys of the court to preside on the trial . . . or hold the court for the occasion."

A thorough review of the above statute was made in the case of *Powers* v. *Commonwealth*, 114 Ky. 237, 70 S. W. 644, 1050, 71 S. W. 494. In speaking of the statute the court said: "From this statute and the decisions quoted from, the law may be gathered to be, if a litigant files his affidavit, stating that the judge will not give him a fair and impartial trial, and states therein the basis of such belief, or if the facts so stated are such 'as would prevent an official of personal integrity from presiding in the case or as would prevent him from affording a fair and impartial trial' then the truth of the statement of the facts as set out in the affidavit must be assumed, for it cannot be traversed or tried."

The basis of such a statute is the well recognized cardinal rule of law that every person charged with the commission of a crime or misdemeanor or who prosecutes or defends in a civil action, is entitled to a fair and impartial trial of the case on its merits. This rule is declared in some form in nearly all of the constitutions of the states of the Union. In Kentucky it is expressed in sections 7, 11, 14 of the Bill of Rights, the provisions for its enforcement being, in part, contained in section 968 of the Statutes, *supra*. *Stamp* v. *Commonwealth*, 195 Ky. 404, 243 S. W. 27.

To entitle a litigant to have the regular judge retire he must state in his affidavit the facts upon which he founds his belief that the judge will not give him a fair trial; and the facts thus stated must be such as should prevent the judge from presiding. The trial judge determines the sufficiency of the affidavit and his decision is subject to revision on appeal. *German Ins. Co.* v. *Landrum*, 88 Ky. 433, 11 S. W. 367; *Sparks* v. *Colston*, 109 Ky. 711,, 60 S. W. 540; *Schmidt* v. *Mitchell*, 101 Ky. 570, 41 S. W. 929.

The objection to the trial judge, to be available, must be made before an appearance to the merits of the action, or the submission of preliminary motions by either party preparatory to a trial. *German Ins. Co.* v. *Landrum, supra.*

In accord with the decision in the case at bar is the case of *Berger* v. *U. S.*, 255 U. S. 22, 65 L. Ed. 481. It was there held that under Jud. Code sect. 21 (Comp. St. sect. 988) which is similar to our own statute, that the judge against whom the affidavit is filed, cannot pass on the truth of the matters alleged or preside on the trial. He may, however, pass on the legal sufficiency of the affidavit.

The reasons for the rule of law in the case at bar would seem to be based on the principle that the dignity of the court shall be preserved; that the judge shall not be called upon to lose his identity as a representative of the sovereignty of the state in that of a litigant in his own court, which would be the inevitable result were he called upon to affirm or deny the statements in an affidavit made for the purpose of having him vacate the bench. C. E. B.

MINES AND MINERALS—RIGHT OF GAS WELL OWNER TO REDUCE NEIGHBOR'S FLOW.—Appellant operated two gas wells upon the C. lease near town of C. Appellee bought a small tract of land near the C.

lease and drilled for and procured natural gas. Under franchise from town of C. appellee entered into active competition with appellant in supplying natural gas to residents of the town. Appellant installed on C. lease a compressor which can be operated so as to increase pressure in service mains and flow from wells to which it is coupled. Appellant insists such use of compressor is solely to maintain proper pressure. Appellee contends such use of compressor has materially reduced flow in its wells and is for purpose to destroy competition of appellee. Held, judgment allowing injunction reversed. "An owner of a gas well may increase the flow of natural gas therefrom for a legitimate purpose by the use of a pump or compressor, notwithstanding flow of wells in adjoining land be thereby diminished." *United Carbon Co.* v. *Campbellsville Gas Co.*, 18 S. W. (2nd) 1110.

As to the question whether the owner of a gas well may increase the flow for a legitimate purpose the law seems to be well settled as is seen in *Calor Oil and Gas Co.* v. *Franzell*, 128 Ky. 715, 109 S. W. 328 "All parties owning gas wells in the district are free to make any legitimate use of gas they choose, and the fact that this legitimate use tends to exhaust the supply gives the other owners of gas wells in the district no ground of complaint." Also in, *Louisville Gas Co.* v. *Ky. Heating Co.*, 117 Ky. 71, 77 S. W. 368, "every owner may bore for gas on his own ground, and may make a reasonable use of it; but he may not wantonly injure or destroy the reservoir common to him and his neighbor."

The question as to use of pump or compressor in increasing the gas flow and consequent reduction of neighbor's flow has not heretofore been raised or decided in this state, but by analogy with decisions upon the same question as to oil, the holding of the court in the case at bar is well supported by the able opinion of Dietzman, J., and its soundness cannot be questioned.

Thus in *Jones* v. *Forrest Oil Co.*, 194 Pa. 379, 48 L. R. A. 748, holding, "a gas pump may lawfully be used to increase the production of wells, altho the production of wells on adjoining property is thereby diminished;" also, *Natlie Oil Co.* v. *La. Ry. Co.*, 137 La. 706, 69 So. 146, "the owner of a well has the right to explode nitroglycerine or other explosives in a well to increase the flow of gas or oil, even though he thereby may, or actually does, draw away the gas or oil in the adjoining territory."

Indiana seems to be the only jurisdiction which is not willing to extend the rule as to use of pump or compressor to gas wells in obtaining an increase in flow. There, by statute such means are expressly prohibited, yet this statutory prohibition fails to provide for the question as presented in the case at bar where the increased flow was not primarily to obtain larger quantity of gas, but to increase the pressure to enable the appellant to furnish distant towns with the use thereof.

As to oil wells it is the settled practice, fortified by judicial decisions, that the owner has the right to pump them, and oil and gas being analogous by decisions in this regard, the owner of a gas well, at least for a legitimate purpose, has the like right. A. J. A.

PHYSICIANS AND SURGEONS—MALPRACTICE—NECESSITY OF EXPERT TESTIMONY.—Action against a dentist for malpractice in fracturing a jaw-bone while removing an impacted wisdom tooth. Held: That in an action against a physician for damages for want of proper skill plaintiff has the burden of showing such want, and such want of skill and care can only be established by experts skilled in that profession. *Donoho* v. *Rawleigh*, 18 S. W. (2nd) 311.

The principal case follows the general rule as to the necessity of expert testimony required in a malpractice case. *Miller* v. *Toles*, 183 Mich. 252, 15 N. W. 118; *Lorenz* v. *Terche*, 157 Minn. 437, 196 N. W. 564; *Ladz* v. *Warta*, 111 Neb. 521, 196 N. W. 901. Upon questions involving a highly specialized art the court and the jury must be dependent on expert evidence and when there is no such evidence to support an allegation depending on such a question there is nothing to justify submitting the issue to the jury. *Ewing* v. *Goode*, 78 Fed. 442.

In order to win an action of damages for malpractice it must be shown that the physician was negligent in failing to exercise such skill and care as his employment requires. *Norkett* v. *Martin*, 63 Colo. 220, 165 P. 256. That degree of care and skill necessary is that which physicians in the same school usually exercise in the same or similar localities under the same or similar circumstances. *Kuchnemann* v. *Boyd*, 193 Wis. 588, 214 N. W. 326. The standard of ordinary skill and care must be established by testimony of experts. *McGraw* v. *Keer*, 23 Colo. App. 163, 128 P. 870; *Hunter* v. *Burroughs*, 123 Va. 113, 96 S. E. 360. Without such testimony the jury has no standard to determine whether the defendant was negligent. *Kuchnemann* v. *Boyd*, *supra*. It is improper to submit malpractice case to the jury without expert testimony to establish the standard according to which they are to judge the conduct of the defendant. Inference without such proof would be merely a matter of speculation. *Gallagher* v. *Kermott*, 56 N. D. 176, 216 N. W. 569. Bad results and a showing of the circumstances do not justify an inference of improper treatment. Evidence of experts that negligence or unskillfullness in their opinion caused the bad results and suffering is necessary. *Miller* v. *Toles*, *supra*.

Expert testimony is not necessary in every case to establish negligence of the physician. A distinction is drawn between cases involving the merits of a diagnosis and scientific treatment and cases where during the performance of the operation and treatment an ulterior act or omission occurs which does not require scientific opinion to throw light on the subject. *Werzeldt* v. *Hartzell*, 1 Fed. (2nd) 633. In the first class of cases expert testimony is necessary to establish negligence. In the second type of cases it is not. Whether an operation is skillfully or unskillfully performed is a scientific question to be established by the testimony of experts. If, however, the surgeon should loose his instrument in the incision it would seem as a matter of common sense that scientific opinion could throw no light on the subject of negligence. *Wharton* v. *Warner*, 75 Wash. 470, 135 P. 235. The jury is not necessarily bound by expert testimony but can take into consideration the

proved facts and circumstances attending the operation. *Reynolds* v. *Smith*, 148 Iowa 264. Ordinarily jurors would find difficulty without the help of medical evidence in determining the right of a patient to recover against his physician for malpractice, based on the lack of scientific skill, but the result may be of such a character as to warrant an inference of want of care from the testimony of laymen or in the light and knowledge of the juries themselves. *Benson* v. *Bean*, 232 N. Y. 52, 133 N. E. 125; *Whitson* v. *Hillis*, (N. D.) 215 N. W. 480; *Leighton* v. *Sargent*, 31 N. H. 119, 64 Am. Dec. 323. K. F.

PLEADING—WHERE PARTY WITHDRAWS DEMURRER AFTER COURT'S ACTION IN IMPROPERLY OVERRULING IT, RECORD MUST BE TREATED AS THOUGH NO DEMURRER HAD EVER BEEN FILED.—Plaintiff's petition, in an action for death of automobile occupant in Illinois, failed to state that deceased had a widow or next of kin surviving him, as was required by statutes of Illinois. Court improperly overruled defendant's demurrer, and he withdrew it. Defendant's motion for a peremptory instruction at the close of plaintiff's testimony was granted. In affirming the case, the Court of Appeals treated the record as though no demurrer had ever been filed. *Utterback's Admr.* v. *Quick*, 230 Ky. 333, 19 S. W. (2d) 980.

This particular question seems well settled in Kentucky. *Trigg* v. *Shields*, 3 Ky. 176; *Strekdon* v. *Bayless*, 5 Ky. 60; *Farrow* v. *Turner*, 9 Ky. 495. A waiver of the demurrer by pleading over will be a virtual withdrawal and its effect on the record will be the same, i. e., the record will be treated as though no demurrer had ever been filed, and the decision of the court in overruling the demurrer cannot be assigned as error. *Crozier* v. *Gano*, 4 Ky. 257; *Beiler* v. *Young*, 6 Ky. 520; *Fehler* v. *Gosnell*, 99 Ky. 380; *Dickson* v. *Gleason*, Id.

That a withdrawn demurrer forms no part of the record seems so well settled that courts treat the result as a matter of course; and when they find it necessary to comment thereon, they generally confine their comments to short statements of the rule, and citation of authority for the rule is deemed superfluous. *Fehler* v. *Gosnell* (*supra*); *McCargo* v. *Jergens*, 206 N. Y. 363, 99 N. E. 838; *Chappell* v. *Jasper County Oil and Gas Co.*, 66 N. E. 515, 31 Ind. App. 170; and the principal case.

The rule as stated lines up perfectly with the general doctrine that pleadings withdrawn, and the rulings thereon, form no part of the record. *Chappell* v. *Jasper County Oil & Gas Co.* (*supra*). R. L.

WILLS—DEFEASIBLE FEES.—The deceased devised certain land to his widow for life, "and at her death to go to my two sons, equally, or to the survivor if either should die without issue."

Held: By this will each of the two sons took a defeasible fee in one-half of the land, which might be defeated by the death of either of them, at any time, without issue surviving him, and in case one should die the other would take the whole fee. If either had issue, such issue would take decedent's share. *Middleton* v. *Graves*, 229 Ky. 640, 17 S. W. (2nd) 741.

This rule is well established in Kentucky by a long line of decisions in which the various courts use practically the same language as that used by the court in the principal case. *Harvey* v. *Bell*, 118 Ky. 512, 81 S. W. 671; *Hart* v. *Thompson*, 42 Ky. 482; *Deboe* v. *Lowden*, 8 B. Mon. 616; *Daniel* v. *Thompson*, 53 Ky. 662. In the latter case it was held that where one of the sons conveyed the land devised to him and then died without issue, the other children could recover. The same rule applies although the devisee has reached his majority. *Harris* v. *Berry*, 70 Ky. 13. But it is held that where the period of distribution is postponed until after the devisees reach majority, the devise does not create a defeasible fee, but such devisees as survive the devisor and become of age take an absolute fee in the land, though they afterward die without issue.

We have been unable to locate any cases in conflict with the principal case, and feel safe in saying that it represents the rule throughout the United States. *Bashell* v. *Bashell*, 118 So. (Ala.) 553; *In Re Clifton's Estate*, 218 N. W. (Iowa) 926; *Duval* v. *Duval*, 291 S. W. (Mo.) 438; *Larew* v. *Larew*, 146 Va. 134, 135 S. E. 819.

While it is true that the law looks with disfavor upon defeasible fees, it seems that in this type of case the law will support such a fee when that was clearly the intention of the testator. E. D. D.

WILLS—DEVISE TO PERSON AND CHILDREN VESTS LIFE ESTATE IN SUCH PERSON, WITH REMAINDER TO CHILDREN, UNLESS WILL SHOWS CONTRARY PURPOSE.—Subject to the payment of the testator's debts, the estate was devised to the widow and children till the youngest should reach his majority. Held, the widow took a life estate, remainder to children. *E. H. Shelman & Co.* v. *Liver's Ex'x*, 229 Ky. 90, 16 S. W. (2nd) 800.

The adjudicated cases in Kentucky show three distinct classes of cases bearing on the subject of gifts by the testator to another and children. The real issue in each case is the interpretation of the word "children," whether the same is used as a word of limitation, showing the nature of the estate given to the first taker, or as a word of purchase, showing that a beneficial interest is devised to the children. Page on Wills, Vol. 2, page 1617. The interpretation intended by the testator must be evidenced by the will as a whole. *Williams* v. *Duncan*, 92 Ky. 127, 17 S. W. 442. The first class of cases is to the effect that the parent takes a joint estate in fee simple with children then born or thereafter to be born. *Powell v. Powell*, 5 Bush 620, 96 Am. Dec. 372; *Turner* v. *Patterson*, 5 Dana 295; *Cessna* v. *Cessna's Admr.*, 4 Bush

516; *Bell* v. *Kinneer*, 101 Ky. 271, 40 S. W. 686, 72 Am. St. Rep. 410. Unless it is expressly shown by the will that such was the intent of the testator the court will not adhere to this class of cases since to do so would likely result in a stranger to the blood of the testator acquiring some portion of the estate. *Houchins* v. *Houchins*, 158 Ky. 190, 164 S. W. 791.

The second class of cases is where the word "children" is used in the sense of heirs. Such a construction is adopted only where the will as an entirety would seem to indicate that the testator intended the words as words of limitation and not of purchase. *Childers* v. *Logan*, 23 Ky. Law Rep. 1239; *Moran* v. *Dillehay*, 8 Bush 434; *Hood* v. *Dawson*, 98 Ky. 285, 33 S. W. 75; *Williams* v. *Duncan*, 92 Ky. 125, 17 S. W. 330; *Lachland's Heirs* v. *Downings' Exrs.*, 11 B. Mon. 32.

The third class of cases adheres to the doctrine as laid down in the instant case, that is, that the parent takes a life estate, with remainder to children, in the absence of a contrary intention being shown. This class of cases represent the overwhelming weight of authority. *Weaver* v. *Weaver's Ex'rs.*, 92 Ky. 491, 185 S. W. 228, 36 Am. St. Rep. 604; *Rice* v. *Klette*, 149 Ky. 787, 149 S. W. 1019, L. R. A. 1917B 45; *Fletcher* v. *Tyler*, 92 Ky. 145, 17 S. W. 282, 36 Am. St. Rep. 584; *Hall* v. *Wright*, 121 Ky. 16, 87 S. W. 1120; *Brumley* v. *Brumley*, 28 Ky. Law Rep. 231, 89 S. W. 182; *Davis* v *Hardin*, 80 Ky. 672; *McFarland* v. *Hatchett*, 118 Ky. 423, 80 S. W. 1185.

The Federal courts are in accord with the rule adhered to in the principal case. *John II Estate* v. *Brown*, 35 S. Ct. 106, 235 U. S. 342, 59 L. Ed. 259. A majority of the state courts also agree. *Gist* v. *Pettus*, 115 Ark. 400, 171 S. W. 480; *Suttle & Weaver Land Improvement Co.* v. *Barker*, 178 Ala. 366, 60 So. 157; *Davenport* v. *Collins*, 96 Miss. 716, 51 So. 449; *Brokaw* v. *Emens*, 84 N. J. Eg. 652, 95 Atl. 117; *Shields* v. *Aitken*, 236 Pa. 6, 84 Atl. 662; *Guy* v. *Osborne*, 91 S. C. 291, 74 S. E. 617.

It is submitted that the rule of the present case is the one most likely to carry out the intent of the testator in a majority of the cases.

E. E. A.